

## *Memorandum*

To: North East Town Board

Cc: Warren Replansky

From: Jon Yard Arnason, Chair, Solar, Sign and Wind committee (the "Committee")<sup>1</sup>

Date: December 30, 2019

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### Introduction

This Memorandum summarizes the significant changes to the Town Sign Law designed to make the sign law, to the extent practicable, consistent with existing Constitutional Law.

It is important to remember that our task was therefore limited. Thus, we did not examine the extent to which the Sign Law should be amended in light of changed conditions in the Town in the last ten years.<sup>2</sup>

The Comprehensive Plan adopted in November 2019 (the "Comprehensive Plan") contemplates the revision of the Town Zoning Law, which would include the Sign Law. We believe more substantive changes should be addressed in connection with a full review of the Town Zoning Law.

The existing Town Sign Law, Section 180-55 et seq. to the Town Code, appeared to the Committee to be in reasonable compliance with existing law. This is in large part because the Town Board, when enacting the sign law in 2009, did not for example seek to regulate the content of the signs of businesses, but rather only their size, shape and location. Thus, the changes which we believed necessary were fairly limited.

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<sup>1</sup> The other members of the Committee were: Ralph Fedele, Lance Middlebrook, Gregg Osofsky and Julie Schroeder.

<sup>2</sup> Thus, the issues raised by the new American Legion sign were not within our purview.

In addition to the changes necessary for constitutional purposes, we made several other changes. First, we put the sections relating to administration of the sign law in a single section, K. Second, we expanded the authority of the Zoning Enforcement Officer to include removal of signs in Section M. Third, we made a minimal number of other changes which seemed appropriate in terms of the general purposes of the Sign Law.

In revising the existing sign law, we were generally guided by the following principle:

Content-based restrictions are ones where the sign law is triggered by the message conveyed, by the identity of the speaker or by the particular point of view. The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others. First Amendment protections encompass not only content-based *prohibitions* on speech, but also content-based *restrictions* on speech.

New York Department of State, Municipal Control of Signs (2015), p. 3.

#### Changes

Section A.(1) [New sign law]<sup>3</sup> -- We expanded the introductory section to include a reference to the Comprehensive Plan. Under Section 272-A. (11) of the State Town Law, all changes to land use regulations (which clearly includes zoning laws) must be accordance with the Comprehensive Plan.

Section A.(1)(g) [Old sign law] – we eliminated this section because we didn’t understand it.

Sections A.(1)(h) – (l) [New sign law]– We added these sections, taken from other Towns’ sign laws, because we believed them to be appropriate purposes, and because the more extensive and specific the description of the purposes of the sign law, the greater the chances that the sign law will be upheld, if challenged.

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<sup>3</sup> We indicate whether a reference is to the new or the old sign law.

Section B.1 [New sign law] – Consistent with Town zoning law, all signs not specifically permitted are forbidden.

Sections B.1(h), (l) [Old sign law] – We eliminated these sections as clearly unconstitutional.

Section B.3 [New sign law] – We added a specific prohibition on signs on public property.

According to Paula Gilbert, an attorney with the Department of State, signs such as political yard signs are prohibited in the State Highway right of way by Highway Law Section 52, which provides, in relevant part:

Except in connection with the construction, reconstruction, maintenance or improvement of a state highway, no person, firm, corporation, municipality, or state department or agency shall construct or improve, within the state highway right of way an entrance or connection to such highway, or construct within the state highway right of way any works, structure or obstruction, or any overhead or underground crossing thereof, or lay or maintain therein underground wires or conduits or drainage, sewer or water pipes, except in accordance with the terms and conditions of a work permit issued by the commissioner of transportation or his duly designated agent, notwithstanding any consent or franchise granted by any town or county superintendent, or by any other municipal authority.

Highway Law Section 136, which applies to county roads, contains essentially identical language.

It is not obvious to me that these sections apply to temporary signs such as political yard signs, which are the bulk of the signs erected in the state and county highway rights-of-way in North East. This is a topic worth pursuing in connection with a full review of the sign law in connection with the contemplated review of the entire Zoning Law.

Section B.4 [New sign law] – We added a specific prohibition on signs on utility poles, which are an increasing problem in North East.

Section B.5 [New sign law] – We provided that the Town Board could, but need not, develop a sign manual to provide guidance to property owners in the erection of signs. (This was taken from the Hype Park sign law.)

Section B.6 [New sign law] – We took the opportunity to fix the current definition for sign area which was subject of an appeal by Irving Farm to the ZBA. Upon examination, it turned out the existing sign ordinance on sign area was clearly ambiguous. As you know, ambiguity is construed against the Town and the ZBA avoided the problem by granting Irving Farm an area variance.

Section C.(1)(c) [New sign law] – The existing sign law (§B.(1)(d)) permits “flags and insignia of any government . . . .” This is clearly a content-based restriction and, we believe, unconstitutional. Our draft, found at C.1(c), expands the section to (a) provide for a size limitation, and (b) expand to include signs of a government, civic or religious organization. This revision is not perfect, and a possible alternative is simply to provide for a flag or insignia of no more than 24 square feet. This then would permit political flags, such as a Trump sign on Route 22 near the traffic light, or indeed any other kind of flag. Note that the size limitation would make illegal the American flag currently located at McEnroe’s, although it of course would be “grandfathered”. The Town Board may wish to consider eliminating the size requirement.

Section C.(2)(a) [New sign law] – This is unchanged from the current sign law. Although the provision clearly restricts content, the Supreme Court has provided special protection for signs of this sort.

Sections C.(2)(d) and H.(2)(b) [New sign law] – These sections may be problematic, since they in effect give preference to businesses selling agricultural products. However, we decided to leave them “as is”.

Section M, Enforcement – Section A.(3) [Old Sign Law] – We have expanded enforcement under this section.